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No. 01-

IN THE

Supreme Court of the United States

GPM GAS CORPORATION and
PHILLIPS PIPELINE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, *ex rel.*,
JACK J. GRYNBERG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. BOYCE
Counsel of Record
RICHARD N. CARRELL
DANIEL M. MCCLURE
WARREN S. HUANG
FULBRIGHT & JAWORSKI L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(713) 651-5151
Counsel for Petitioners

172087

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED FOR REVIEW

1. Does the False Claims Act's *qui tam* provision violate the requirement of separation of powers under the Constitution in cases in which the Government does not intervene?

2. Does the False Claims Act's *qui tam* provision violate the Take Care Clause of Article II of the Constitution in cases in which the Government does not intervene?

3. Does the False Claims Act's *qui tam* provision violate the Appointments Clause of Article II of the Constitution in cases in which the Government does not intervene?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the Court below are: Jack J. Grynberg (Plaintiff-Appellant); GPM Gas Corporation (Defendant-Appellee); and Phillips Pipeline Company (Defendant-Appellee).

CORPORATE DISCLOSURE STATEMENT

Duke Energy Field Services, LP is the successor by merger to GPM Gas Corporation. Duke Energy Corporation and Phillips Petroleum Company are the ultimate parent companies of Duke Energy Field Services, LP.

Phillips Pipe Line Company (sued as Phillips Pipeline Company) is a wholly-owned subsidiary of Phillips Petroleum Company.

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PETITION FOR A WRIT OF CERTIORARI

GPM Gas Corporation and Phillips Pipeline Company file this Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The district court's order and the court of appeals' opinion are unpublished. The district court's order of dismissal was entered in Civil Action No. H-97-2484; *United States of America, ex rel. Jack J. Grynberg v. GPM Gas Corporation and Phillips Pipeline Company*; In the United States District Court for the Southern District of Texas, Houston Division. *See* App. at 3a-4a. The court of appeals' opinion was entered in No. 99-21053; *United States of America, ex rel., Jack J. Grynberg v. GPM Gas Corporation; Phillips Pipeline Company*; In the United States Court of Appeals for the Fifth Circuit. *See* App. at 1a-2a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on November 9, 2001. No petition for rehearing or petition for rehearing en banc was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the False Claims Act's *qui tam* provision, 31 U.S.C. § 3729, *et seq.*, are reproduced in the appendix to this petition. *See* App. at 5a-8a.

The Take Care Clause of Article II of the Constitution states: ". . . [H]e shall take Care that the Laws be faithfully executed . . ." U.S. CONST. art. II, § 3.

The Appointments Clause of Article II of the Constitution states:

> . . . [H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2.

STATEMENT OF THE CASE

Jack J. Grynberg, a private citizen, sued GPM Gas Corporation and Phillips Pipeline Company under the *qui tam* provision of the False Claims Act ("FCA"), 31 U.S.C. § 3729, *et seq.* Jurisdiction in the district court was predicated on 28 U.S.C. § 1331 and 31 U.S.C. § 3732(a). Alleging that the volume and heating content of natural gas produced on federal and Native American lands had been improperly measured, Grynberg sought recovery of royalties allegedly underpaid to the Government. Pursuant to 31 U.S.C. § 3730(b)(4)(B), the Government declined to intervene in Grynberg's suit.[1]

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1. Grynberg also filed many other *qui tam* suits against numerous other pipeline companies on the same theory. *See In re Natural Gas Royalties Qui Tam Litig.*, No. 1293, 1999 U.S. Dist. LEXIS 20892 (J.P.M.L. Oct. 20, 1999); *United States ex rel. Grynberg v. Alaska Pipeline Co.*, No. 95-725, 1997 U.S. Dist. LEXIS 5221 (D.D.C. Mar. 27, 1997), *aff'd without contest*, No. 98-5224, 1998 U.S. App. LEXIS 33941 (D.C. Cir. Dec. 1, 1998). The Government declined to intervene in those suits as well.

GPM and Phillips sought dismissal in the district court on grounds that Grynberg lacked standing under Article III of the Constitution, and because Grynberg's suit violated the Take Care Clause and Appointments Clause of Article II of the Constitution. The district court held that Grynberg lacked standing and dismissed the action pursuant to its own prior opinion, *Riley v. St. Luke's Episcopal Hospital*, 982 F. Supp. 1261 (S.D. Tex. 1997), in a final and appealable judgment. *See* App. at 4a. The district judge in *Riley* was the same district judge in this case. Grynberg appealed to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291.

The Fifth Circuit reversed the district court's dismissal and remanded for further proceedings, holding that (1) Grynberg had standing under *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000); and (2) the Article II constitutional challenges were resolved in the Fifth Circuit in *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 758 (5th Cir. 2001) (en banc). *See* App. at 2a.

REASONS FOR GRANTING THE PETITION

I. This Case Squarely Presents the Article II Challenges to *Qui Tam* That Were Left Open in *Stevens*.

This case provides an appropriate vehicle to address questions of federal law concerning the constitutionality of the FCA's *qui tam* mechanism under Article II and separation of powers principles. These questions are of surpassing importance and have not been, but should be, settled by this Court. *See* SUP. CT. R. 10(c).

A. *Stevens* Did Not Resolve the Article II Challenges.

In *Stevens*, 529 U.S. at 773 & n.4, this Court held that a *qui tam* relator such as Grynberg has standing to sue based on the United States' injury-in-fact because the relator sues

"as a partial assignee of the United States." The majority went on to state, "[W]e express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3." *Stevens*, 529 U.S. at 778 n.8.

B. The Fifth Circuit Now Has Addressed the Article II Challenges in Light of *Stevens*.

In *Riley*, a divided Fifth Circuit addressed the Article II challenges in the context of a *qui tam* case – like this one – in which the Government declined to intervene under 31 U.S.C. § 3730(b)(4)(B). Relying heavily on *Stevens*' historical discussion in connection with the Article III standing analysis, the en banc Fifth Circuit held that the FCA's *qui tam* provision is constitutional under the Take Care Clause and the Appointments Clause of Article II, and does not violate separation of powers principles. *Riley*, 252 F.3d at 752-58. Judge Smith, joined by Judge DeMoss, dissented and fully explored the constitutional problems created under Article II when a private citizen appoints himself to litigate the Government's interests in the absence of Government intervention. *Id.* at 758-75.

Because Grynberg's claims, like those at issue in *Riley*, also involved a circumstance in which the Government opted not to intervene, and because this case presented the same Article II challenges discussed in *Riley*, the Fifth Circuit panel relied exclusively on the *Riley* en banc opinion in rejecting Petitioners' Take Care Clause and Appointments Clause challenges. *See* App. at 2a.

C. The Court Should Use This Opportunity to Answer the Open Article II Questions.

Although a circuit split does not exist at present on the Article II challenges to the FCA's *qui tam* provision,[2] the divided Fifth Circuit's debate on these issues in *Riley* demonstrates that they raise significant and fundamental questions about the balance of power among the Executive, Legislative, and Judicial Branches. These questions have been percolating since the 1986 amendments to the FCA prompted an explosion of *qui tam* litigation.[3] These significant questions warrant review by this

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2. Since *Stevens* was decided, two circuits have addressed the Article II challenges. The Fifth Circuit found the FCA's *qui tam* mechanism constitutional under Article II when the Government does not intervene in *Riley*, 252 F.3d at 752-58. The Tenth Circuit held that the FCA's *qui tam* provision was constitutional under Article II in *United States ex rel. Stone v. Rockwell International Corp.*, Nos. 99-1351, 99-1352, 99-1353, 2001 WL 1117107, at *13-*16 (10th Cir. Sept. 24, 2001), a case in which the Government intervened as to some but not all of the claims asserted by the relator. Several district court decisions issued after *Stevens* also have found the FCA's *qui tam* provision to be constitutional under Article II when the Government does not intervene. *See United States ex rel. Kinney v. Hennepin Cty. Med. Ctr.*, No. 971680, 2001 WL 964011, at *4 (D. Minn. Aug. 22, 2001); *United States ex rel. K & R Ltd. Partnership v. Mass. Housing Fin. Agency*, 154 F. Supp. 2d 19, 25-27 (D.D.C. 2001); *Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 770-72 (E.D. Pa. 2001); *United States ex rel. Phillips v. Pediatric Servs. of Am., Inc.*, 123 F. Supp. 2d 990, 992-94 (W.D.N.C. 2000). However, in an opinion ordering the parties to brief the *qui tam* provision's constitutionality under Article II, one district court has indicated its agreement with the arguments made by the judges who dissented from the *Riley* en banc opinion. *See United States ex rel. Fender v. Tenet Healthcare Corp.*, 105 F. Supp. 2d 1228, 1232-33 (N.D. Ala. 2000).

3. Prior to *Stevens*, the Sixth and Ninth Circuits held that the FCA's *qui tam* provision is constitutional under Article II's Take Care Clause and Appointments Clause. *See United States ex rel. Taxpayers Against*

(Cont'd)

Court to protect Executive Branch authority from further diffusion. The significance of these issues is confirmed not only by *Stevens*, but also by *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000).

The majority opinion in *Stevens* concludes that the *qui tam* relator is "a *partial* assignee of the United States" and that the FCA effects a "partial assignment of the Government's damages claim." *Stevens*, 529 U.S. at 773 & n.4 (emphasis in original). The majority took pains to note that the relator is not a full assignee; rather, he is only "partial assignee" as to that "portion of the recovery retained by the relator . . ." *See id.* at 772; *see also id.* at 773 n.4.

(Cont'd)

Fraud v. Gen. Elec. Corp., 41 F.3d 1032, 1040-42 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 749-59 (9th Cir. 1993); *see also United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 872 (8th Cir. 1998) (quoting *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992)) (stating, in context of dispute over whether states are subject to FCA, that Government has "extensive power" to control litigation even when it does not intervene in *qui tam* action); *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1155 (2d. Cir. 1993) (stating, in context of Article III challenge to relator's standing, that "FCA *qui tam* provisions do not usurp the executive branch's litigating function because the statute gives the executive branch substantial control over the litigation"). *Taxpayers Against Fraud* and *Kelly* both concluded that the relator does not exercise government power, a rationale that cannot be reconciled with *Stevens*' treatment of the relator as only a "partial assignee" of the Government's claim and interests. *See Stevens*, 529 U.S. at 773 & n.4. District courts in other circuits also found the *qui tam* provision to be constitutional under Article II's Take Care Cause and Appointments Clause. *See United States ex rel. Butler v. Magellan Health Servs., Inc.*, 74 F. Supp. 2d 1201, 1212 (M.D. Fla. 1999); *United States ex rel. Gublo v. Novacare, Inc.*, 62 F. Supp. 2d 347, 353-54 (D. Mass. 1999); *United States ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611, 623 (W.D. Wis. 1995); *United States ex rel. Givler v. Smith*, 775 F. Supp. 172, 176-79 (E.D. Pa. 1991).

Therefore, as to that portion of the recovery retained by the relator, a partial assignment theory confers standing. As to the portion of the recovery not retained by the relator, which belongs to the United States, the relator necessarily acts as "the United States, *in whose name* . . . the suit is brought . . ." *Id.* at 772 (emphasis in original).

Stevens' treatment of the relator for standing purposes highlights the Article II and separation of powers problems inherent in the FCA's *qui tam* provision in cases in which the Government does not intervene. When the relator litigates that portion of the Government's claim that has ***not*** been assigned to him, he is unavoidably (1) suing for, as, and on behalf of the United States; and (2) exercising prosecutorial discretion that the Take Care Clause vests exclusively in the Executive Branch. The *qui tam* relator does so without having been appointed in conformity with the Appointments Clause and after having appointed himself. These features render the FCA's *qui tam* mechanism unconstitutional in cases in which the Government does not intervene.

Three Justices have identified the problems surrounding Congress' ability to structure citizen suit provisions in this manner. *See Friends of the Earth*, 528 U.S. at 197, 209-10. Justice Kennedy has noted:

> Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States.

Id. at 197 (Kennedy, J., concurring).

Justice Scalia, joined by Justice Thomas, elaborated on this point in *Friends of the Earth*. Justice Scalia described as "constitutionally bizarre" a statutory structure that "allows public authorities to avoid private enforcement only by accepting private direction as to when enforcement should be undertaken . . ." *Id.* at 210 (Scalia, J., joined by Thomas, J., dissenting). This situation means that "[e]lected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed." *Id.*

The importance of these issues is further underscored by the emergence of a cottage industry dedicated to the pursuit of *qui tam* claims since 1986, and by the striking disparity between the results obtained when the Government intervenes versus when it does not intervene. Of 2,520 *qui tam* cases concluded as of May 2001, the Government intervened in 554 of them (22 percent) and declined to intervene in 1,966 (78 percent). *See Riley*, 252 F.3d at 767 n.24 (Smith, J., dissenting). Of the cases in which the Government intervened, it failed to obtain recoveries in only two percent of them. *Id.* Of the cases in which the Government did ***not*** intervene, the private relator failed to obtain recoveries in at least 74 percent of them. *Id.* It follows that *qui tam* cases in which the Government does not intervene inflict significant damage upon Executive Branch authority while providing an ineffective means of protecting the Government's interests.

These circumstances establish the backdrop against which the constitutional merits of the FCA's *qui tam* provision must be assessed in cases in which the Government does not intervene.

II. History Cannot Cure the *Qui Tam* Provision's Constitutional Infirmities.

Contrary to the Fifth Circuit's view in *Riley*, this Court's historical discussion in *Stevens* is not dispositive of the Petitioners' Article II challenges.

It is important to recognize the limited nature of the historical inquiry undertaken in *Stevens*. Justice Scalia was careful to note "[t]hat history is particularly relevant to the constitutional standing inquiry since . . . Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.' " *Stevens*, 529 U.S. at 774 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)).

The *Stevens* majority focused its historical analysis solely on the question of the nature of "cases" and "controversies" as understood at the time of the framing of the Constitution. *Stevens*' historical analysis did not purport to go beyond this narrow question. Acknowledging the existence of *qui tam* suits is not the same thing as acknowledging the propriety of *qui tam* suits under Article II. As noted above, the *Stevens* majority expressly disclaimed any view on the Article II challenges now before this Court. *See Stevens*, 529 U.S. at 778 n.8.

This narrow focus may be explained by the sporadic historical record of the *qui tam* mechanism in this country. *See Riley*, 252 F.3d at 774-75 (Smith, J., dissenting). "On this side of the Atlantic, qui tam never really gained a secure foothold, particularly at the federal level." 13 Op. Off. Legal Counsel 207, 235 (1989); *see also* James T. Blanch, *The Constitutionality of the False Claims Act's Qui Tam Provisions*, 16 HARV. J. L. & PUB. POL'Y 701, 721 (1993) [cited hereinafter as "THE CONSTITUTIONALITY OF QUI TAM"]. Most of

the earliest *qui tam* provisions employed in this country were narrowly circumscribed and do not provide an historical basis for deciding the constitutionality of the provision at issue here. *See Riley*, 252 F.3d at 773-74.

By the Petitioners' count, only three of the *qui tam* statutes passed by the First Congress reasonably can be read to permit a private person who had not suffered an individual injury to sue solely for an injury to the Government's interests.[4] Many of the early so-called *qui tam* statutes were simple informer laws that did not purport to grant a cause of action to a private citizen; instead, they merely awarded informers a share of any recoveries secured by government officials. *See Riley*, 252 F.3d at 773 n.48 (Smith, J., dissenting). Consequently, those provisions did not raise constitutional problems. Of those laws permitting private actions, most permitted suit for redress of private injuries suffered by private individuals – not for injuries suffered exclusively by the Government. *See id.* at 773 & n.48.

All of the *qui tam* statutes enacted by the First Congress have since been repealed. *See Riley*, 252 F.3d at 774 (Smith, J., dissenting); THE CONSTITUTIONALITY OF QUI TAM at 721; Note, *The History and Development of Qui Tam*, 1972 WASH. U. L. Q. 81, 99 (1972) [cited hereinafter as "HISTORY OF QUI TAM"]. Apart from the FCA, Congress has subsequently enacted only seven *qui tam* statutes – none after 1871. *See Riley*, 252 F.3d at 774 (Smith, J., dissenting) (citing statutes). There was a "steady erosion" of *qui tam* actions during the latter part of the nineteenth century. *See* HISTORY OF QUI TAM at 99-101. *Qui tam* enjoyed a resurgence in 1943 when relators briefly were allowed to file parasitic suits based upon

4. Act of March 1, 1790, ch. 2, sec. 3, 1 Stat. 102 (informer can bring suit against census marshal for failing to file timely the census return and retain half of the penalty); Act of July 5, 1790, ch. 25, sec. 1, 1 Stat. 129 (applying same to Rhode Island); Act of July 22, 1790, ch. 33, sec. 3, 1 Stat. 137-38 (informer may bring suit for forfeiture of merchandise from unlicensed trading with Indians).

information already in the Government's possession; after that loophole was closed, the mechanism fell back into disuse until the statute was amended again in 1986. *See* Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L. J. 341, 343 nn.12-13 (1989).

With the exception of the statute at issue here, all of the surviving *qui tam* statutes essentially lie dormant and have been described by commentators as "anachronistic" vestiges of the past. *See* P. BATOR *ET AL.*, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1084 (3d ed. 1988). The *qui tam* mechanism was employed sparingly when the nation was in its infancy to bolster a new and fragile government, and later as a result of wartime circumstances. Thus, the highly touted history of *qui tam* in the United States before 1986 really boils down to the occasional employment of the device as a stop-gap measure during times of weakness or crisis. *See Riley*, 252 F.3d at 774 (Smith, J., dissenting). Actions undertaken in such circumstances do not necessarily withstand the scrutiny of less turbulent times. *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

While action taken by the First Congress has been looked to as evidence of the founders' interpretation of the Constitution's meaning, "courts logically have given less weight to acts passed quickly and without deliberation as to their constitutionality." *Riley*, 252 F.3d at 773 (Smith, J., dissenting) (citing *Marsh v. Chambers*, 463 U.S. 783, 791-92 (1983)). The history of *qui tam* statutes indicates that those statutes were "passed more from expediency than from reasoned constitutional analysis" and "that history provides no indication of what were the founders' general opinions of the constitutionality of qui tam statutes, nor what would have been their particular opinion of this case in which an unappointed, unaccountable citizen sues on the government's behalf without government participation." *Riley*, 252 F.3d at 773.

Even if this Court were presented with a formidable historical pedigree, that alone would not establish the constitutionality of *qui tam*. *See Marsh*, 463 U.S. at 790 ("Standing alone, historical patterns cannot justify contemporary violations [of the Constitution]"); *Walz v. Tax Comm'n*, 397 U.S. 664, 677-78 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it"); *United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615, 618 (C.D. Cal. 1989) ("[T]he fact that *qui tam* statutes date back to the time of the First Congress is not independent evidence of their constitutionality"); *see also County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 603-05 (1989); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983).

Longevity does not insulate a particular practice from constitutional scrutiny. Indeed, this Court has previously held acts passed by the First Congress to be unconstitutional. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (striking down part of the Judiciary Act of 1789, a statute adopted by the First Congress); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (declining to enforce the First Congress' grant of non-judicial duties to courts); *see also Marsh*, 463 U.S. at 814 n.30 (Brennan, J., dissenting) (First Congress statute requiring public whipping of thieves is presumably unconstitutional today); *cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (noting "broad consensus" that Alien and Sedition Act of 1798 was unconstitutional).

Deeper analysis beyond *qui tam*'s historical background is required. That analysis properly focuses on the core constitutional principle of separation of powers.

III. The False Claims Act's *Qui Tam* Provision Violates Article II and Separation of Powers Principles.

Separation of powers exists as a principle inherent in the structure under which "the Constitution of the United States divides all power conferred upon the Federal Government into 'legislative Powers,' Art. I, § 1, '[t]he executive Power,' Art. II, § 1, and '[t]he judicial Power,' Art. III, § 1. . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). This principle reflects "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 881 (1983). This Court should grant review because the FCA's *qui tam* provision impermissibly compromises this central and essential principle.

A. Separation of Powers Is Eroded and the Take Care Clause Is Violated When *Qui Tam* Relators Litigate the Government's Claims Absent Government Intervention.

The separation of powers doctrine is violated when one branch of government (1) aggrandizes itself at the expense of another; or (2) undermines the constitutionally granted powers of another, even without aggrandizement of its own power. *See Clinton v. Jones*, 520 U.S. 681, 701 (1997); *Loving v. United States*, 517 U.S. 748, 757 (1996). The *qui tam* provision violates the separation of powers doctrine because it impermissibly interferes with the Executive Branch's constitutionally assigned duty to enforce the nation's laws under the Take Care Clause. The provision does so by conferring the Executive Branch's law enforcement powers on politically unaccountable private relators who are not subject to control by the Government and

who are motivated solely by financial interests that can be inimical to the Government's interests.

By limiting and undermining the Executive Branch's ability to control *qui tam* relators, Congress also has impermissibly aggrandized its own authority in at least two respects. First, Congress has assumed for itself authority to delegate not only its own power, but also power the Constitution confers exclusively upon the Executive Branch. Second, when Congress reduces the Executive Branch's authority under the Constitution, Congress necessarily increases its own authority in relation to the Executive Branch by presuming to act as the power broker who enjoys authority to reconfigure the Constitution's allocation of power. Congress thereby aggrandizes its own role even if the authority it strips from the Executive is not kept for its own use, but is instead given to a private citizen.

1. The Executive Branch's prosecutorial discretion and control are compromised when relators litigate government claims absent intervention.

Article II expressly vests authority to enforce the nation's laws in the Executive Branch: "[The Executive Branch] shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. The cornerstone of this authority is the Executive Branch's power to exercise prosecutorial discretion – the power to decide whether, when, and how the Government's interests should be litigated. Prosecutorial discretion is an inherent element of executive power and belongs exclusively to the Executive Branch. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 202 (1928); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-59 (1869).

a. Prosecutorial discretion

A fundamental component of prosecutorial discretion is the discretion ***not*** to prosecute. The Executive Branch's discretion not to prosecute a claim is absolute. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed'"); *see also Buckley*, 424 U.S. at 138; *Nixon*, 418 U.S. at 693.

The *qui tam* provision strips the Executive Branch of discretion ***not*** to have a claim prosecuted. A relator may file a *qui tam* action even after the Attorney General decides that the lawsuit is unwarranted or against the Government's interests. 31 U.S.C. § 3730(c)(3). Congress, in effect, has given away the Executive Branch's power to make enforcement decisions by authorizing bounty-seeking relators to determine when and how the Government's interests will be litigated under the Act.

Even if the relator does not litigate "as" the Government, the relator certainly litigates ***for*** the Government. The relator would have no suit but for the asserted injury to the Government's interests. The FCA takes away the Executive Branch's discretion to decide whether the Government's interests should be litigated. Congress has given that discretion to the relator, who can decide to prosecute a *qui tam* action even if the Attorney General decides not to do so by declining to intervene.

b. Control of litigation

The *qui tam* provision also violates the Take Care Clause because it limits the Executive Branch's authority to conduct the litigation:

- The Attorney General cannot remove the relator from the lawsuit under any circumstances, even if the Attorney General intervenes. 31 U.S.C. § 3730(c)(1) (if Attorney General intervenes, relator "shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2)," none of which permits removal).

- The Attorney General cannot control the breadth of the relator's lawsuit.

- The Attorney General cannot control how the relator conducts the lawsuit on a day-to-day basis.

The Executive Branch's ability to conduct the litigation is further compromised when the Attorney General chooses to intervene after initially declining to do so. First, the Attorney General may enter the case only if the court finds that such intervention is for "good cause." 31 U.S.C. § 3730(c)(3). Second, the Attorney General cannot limit the relator's "status and rights." *Id.* This broad prohibition against limiting a relator's "status and rights" puts the Executive Branch to a Hobson's choice: It must intervene immediately in every *qui tam* action and assume "primary responsibility" for prosecuting the action, or intervene later and exercise only limited control over the action. 31 U.S.C. §§ 3730(c)(1), (3).

c. Termination of litigation

The *qui tam* provision also interferes with the Executive Branch's authority to terminate the litigation. The Attorney General cannot dismiss a *qui tam* action unless (1) he notifies the relator of the filing of the motion to dismiss; (2) a hearing is held on the motion; and (3) the court grants the motion. 31 U.S.C. § 3730(c)(2)(A). Congress intended these restrictions to be substantial rather than *pro forma*. 1986 U.S.C.C.A.N. 5266, 5291 (1986) (relator's right to object to dismissal is intended to serve "as a check that the Government does not neglect evidence, cause undue delay, or drop the false claim cases without legitimate reasons").

Additionally, the Attorney General cannot settle a *qui tam* action over the relator's objection unless (1) a hearing is held on the settlement; (2) the settlement is "fair, adequate, and reasonable under all the circumstances"; and (3) the court approves the settlement. 31 U.S.C. § 3730(c)(2)(B).

The Executive Branch's authority to terminate *qui tam* litigation is compromised even further after it initially declines to intervene. Section 3730's plain language precludes the Attorney General from dismissing a case if the Government enters the case after initially declining to intervene, thereby stripping the Executive Branch of its power to terminate *qui tam* actions under those circumstances. *See* 31 U.S.C. § 3730(c)(3); James T. Blanch, *The Constitutionality of the False Claims Act's Qui Tam Provisions*, *in* CITIZEN SUITS AND QUI TAM ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY 55, 115 (Roger Clegg & James L. J. Nuzzo, eds., 1996); *but see United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998); *Kelly*, 9 F.3d at 752 & n.8. Section 3730(c)(3) unequivocally states that the court may not limit "the status and rights of the person initiating the action" when the Attorney General enters a case after initially declining to intervene. 31 U.S.C. § 3730(c)(3). Section 3730(c)(3) further

states that "[i]f the Government elects not to proceed with the action, the person who initiated the action ***shall*** have the right to conduct the action." *Id.* (emphasis added).

Allowing the Attorney General to intervene and dismiss a *qui tam* action under the above circumstances would indisputably limit the relator's "status and rights" and "right to conduct the action."[5] Section 3730(c)(3) unambiguously evidences Congress' intent to encourage private *qui tam* actions by requiring the Attorney General to dismiss a case when it is first filed rather than waiting until the relator has already expended substantial time and expense prosecuting the case. *See* 1986 U.S.C.C.A.N. at 5288-89, 5291.

2. Analysis under *Morrison v. Olson* confirms that the Executive Branch's authority is eroded to an unacceptable degree when relators litigate government claims absent intervention.

In *Morrison v. Olson*, 487 U.S. 654 (1988), this Court held that an act of Congress does not violate the Take Care Clause if the Executive Branch retains "sufficient control" over the recipient of the power "to ensure that the President is able to perform his constitutionally assigned duties." *Morrison*, 487 U.S. at 696. The *qui tam* provision is unconstitutional under *Morrison* because the provision restricts – and, in certain situations, eliminates – the Executive Branch's control over *qui tam* litigation, including the authority to initiate, conduct, and terminate such litigation. *See* discussion *supra*, pp. 14-18. Absent such control, the Executive Branch cannot perform its constitutionally assigned duty to enforce the nation's laws.

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5. Of course, a *qui tam* relator's suit is subject to dismissal at any time if the jurisdictional prerequisites to suit under 31 U.S.C. § 3730(e) have not been met.

The *qui tam* provision also is unconstitutional under *Morrison* because it imposes restrictions that go far beyond the Ethics in Government Act ("EGA") – the statute at issue in *Morrison*. The EGA provided the Executive Branch with specific control mechanisms that have no counterpart under the *qui tam* provision. In upholding the constitutionality of the EGA's independent counsel provisions, the *Morrison* Court cited four features that sufficiently preserved the Executive Branch's control of prosecutions under the statute:

> (1) The Attorney General retains the power to remove the independent counsel for "good cause";
>
> (2) An independent counsel cannot be appointed without a specific request by the Attorney General, and the Attorney General's discretion whether to request such an appointment is not subject to review;
>
> (3) The independent counsel's jurisdiction is defined pursuant to the facts submitted by the Attorney General; and
>
> (4) Once an independent counsel is appointed, the EGA requires the independent counsel to abide by Department of Justice policy unless it is not possible to do so.

Morrison, 487 U.S. at 696. None of these mechanisms exists under the FCA.

The Attorney General cannot remove a *qui tam* relator under ***any*** circumstances – not even for good cause – no matter how irresponsible the lawsuit becomes. 31 U.S.C. §§ 3730(c)(1), (3). While the Attorney General may limit the relator's participation upon a proper showing to the court

(31 U.S.C. § 3730(c)(2)(C)) and may dismiss the action with the court's approval after a hearing is held on the motion to dismiss (31 U.S.C. § 3730(c)(2)(A)), the Attorney General cannot remove the relator. Furthermore, if the Attorney General enters a case after initially declining to intervene, the Attorney General cannot remove a relator by dismissing the case because section 3730(c)(3)'s plain language prohibits it from doing so under those circumstances. 31 U.S.C. § 3730(c)(3).

In *Morrison*, this Court found the existence of a qualified right of removal to be crucial in determining whether the independent counsel provisions violated the Take Care Clause:

> Nor do we think that the 'good cause' removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. ***This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws.*** Rather, because the independent counsel may be terminated for 'good cause,' the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.

Morrison, 487 U.S. at 692 (emphasis added).

As to the second mechanism, the Executive Branch cannot block the "appointment" of a *qui tam* relator because the relator appoints himself. Even if the Attorney General determines that there are "no reasonable grounds" for the *qui tam* action, the relator may override that judgment and pursue the lawsuit. 31 U.S.C. § 3730(c)(3) ("If the Government elects not to proceed

with the action, the person who initiated the action ***shall*** have the right to conduct the action") (emphasis added). The lawsuit then goes forward in the Government's name under the relator's control.

The third and fourth mechanisms also are absent under the FCA. The Attorney General has no control over the breadth of the relator's lawsuit. The relator may make sweeping allegations that, even if true, he cannot litigate effectively, thereby binding the Government under *res judicata* principles and preventing the Government from later filing suit on those allegations when more information becomes available. Finally, the relator, unlike the independent counsel, is not required to adhere to Department of Justice policy when litigating on the Government's behalf.

This Court has rejected other attempts by Congress to interfere with powers expressly and exclusively conferred upon the Executive Branch under Article II. *See Bowsher v. Synar*, 478 U.S. 714, 732-34 (1986) (holding unconstitutional provision of Budget and Emergency and Emergency Deficit Control Act allowing Comptroller General to execute Act because "Congress in effect has retained control over the execution of the Act and has intruded into the executive function" and "[t]he Constitution does not permit such intrusion"); *Chadha*, 462 U.S. at 956-59 (holding unconstitutional provision of Immigration and Nationality Act allowing legislative veto because such provision violated requirement that all legislation be presented to President for his signature before becoming law); *Buckley*, 424 U.S. at 143 (holding unconstitutional provision of Federal Election Campaign Act allowing Congress to appoint members of Federal Election Commission because provision interfered with Executive Branch's power to appoint officers of United States); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1872) (holding unconstitutional statute limiting full legal effect of Executive Branch's pardon power because such power "flows from the Constitution alone" and "cannot be modified, abridged, or diminished by the Congress"). The FCA's *qui tam*

mechanism must be rejected as well in cases in which the Government does not intervene.

This Court recently suggested that *Morrison* represents the outer limits of Congress' ability to interfere with the Executive Branch's law enforcement powers. In *Printz v. United States*, 521 U.S. 898 (1997), this Court struck down, on other grounds, provisions of the Brady Act which required state officials to execute federal law by conducting background checks on gun purchasers. In dictum, the Court signaled that Congress' decision to vest federal law enforcement authority in state officials may be unconstitutional under the Take Care Clause:

> The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints. . . . The Brady Act effectively transfers this responsibility to thousands of [state law enforcement officers] in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive – to insure both vigor and accountability – is well known. . . . ***That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.***

Id. at 922 (emphasis added).

This Court's observations in *Printz* apply here. The *qui tam* provision allows Congress to circumvent the Executive Branch by deputizing an army of private relators to execute the FCA on

Congress' behalf. Congress' deputization of these relators not only obviates the need for Executive Branch enforcement, but also allows Congress to circumvent the Executive Branch's discretion not to prosecute specific claims under the statute.

B. The Appointments Clause is Violated When *Qui Tam* Relators Litigate the Government's Claims Absent Government Intervention.

The *qui tam* provision violates the Appointments Clause by authorizing private relators to litigate on the Government's behalf. If *qui tam* relators are officers of the United States, then they are not properly appointed to perform that function under the Appointments Clause. If *qui tam* relators are not officers of the United States, then the Appointments Clause prohibits them from litigating on the Government's behalf because officers of the United States are the only persons authorized to perform that function. Either way, the *qui tam* provision fails.

1. If *qui tam* relators are officers of the United States, they are not properly appointed.

a. *Qui tam* relators enjoy "significant control" over litigation brought on the Government's behalf.

We now know that *qui tam* relators litigate at least in part on behalf of the United States. *See Stevens*, 529 U.S. at 773 n.4 ("More precisely, we are asserting that a *qui tam* relator is, in effect, suing as a *partial* assignee of the United States") (emphasis in original). This Court has twice held that persons litigating on behalf of the United States are officers of the United States.

In *Buckley v. Valeo*, the Supreme Court held that the Federal Election Campaign Act of 1971 – which authorized the President *pro tempore* of the Senate and the Speaker of the

House to select four of the six voting members of the Federal Election Commission – violated the Appointments Clause. *Buckley*, 424 U.S. at 113, 140. The Court reasoned that the Act assigned the Commission "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" and that "[s]uch functions may be discharged only by persons who are 'Officers of the United States.'" *Id.* Since the Commission members were officers, Congress' appointment of those members violated the Appointments Clause. *See id.* at 138-40.

In *Morrison v. Olson*, this Court held that independent counsel appointed under the EGA are officers of the United States. *Morrison*, 487 U.S. at 671 n.12 ("It is clear that [the independent counsel] is an 'officer' of the United States, not an 'employee'"). Based on the Court's holdings in *Buckley* and *Morrison*, relators are officers of the United States because they conduct civil litigation for the purpose of "vindicating public rights" – namely, addressing asserted fraud committed against the Government.

Buckley adopted a general rule for distinguishing between officers and non-officers for Article II purposes: "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of . . . [Article II]." *Buckley*, 424 U.S. at 126; *see also Edmond v. United States*, 520 U.S. 651, 662 (1997); *Weiss v. United States*, 510 U.S. 163, 169-70 (1994); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 881 (1991). The authority of *qui tam* relators to initiate, conduct, and terminate litigation on behalf of the United States brings them within the *Buckley* standard.

Like its diffusion of the Executive Branch's law enforcement powers, the *qui tam* provision's diffusion of the Executive Branch's appointment power necessarily aggrandizes

Congress' authority by (1) giving Congress the authority to delegate powers which the Constitution has expressly and exclusively conferred upon another branch; and (2) increasing Congress' authority in relation to the Executive Branch. Thus, the *qui tam* provision raises separation of powers concerns under the Appointments Clause.

b. Parties who litigate on the Government's behalf must be properly appointed.

The Appointments Clause establishes two mechanisms for appointing officers of the United States. "Ambassadors, other public Ministers and Consuls, Judges of the supreme court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for" are nominated by the President and confirmed "by and with the Advice and Consent of the Senate." U.S. CONST. art. II, § 2 "[I]nferior Officers" may be appointed by the President, "Courts of Law," or "the Heads of Departments." *Id.*

If relators fall within the first class of officers, then the *qui tam* provision violates the Appointments Clause because relators are not nominated by the President and confirmed by the Senate. If relators are "inferior Officers" who may be appointed by the President or "the Heads of Departments" (*e.g.*, the Attorney General), then the *qui tam* provision violates the Appointments Clause because relators are appointed by no one. They appoint themselves. Therefore, *qui tam* relators are not properly appointed pursuant to any of the mechanisms in the Appointments Clause. Instead, Congress has transferred the appointment power to private parties who appoint themselves merely by filing suit.

2. If *qui tam* relators are not officers, they cannot litigate for the Government.

If *qui tam* relators are not officers of the United States, then the *qui tam* provision violates the Appointments Clause because only officers may conduct litigation on behalf of the United States. *See Buckley*, 424 U.S. at 140; *compare United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 294 (5th Cir.), *cert. denied*, 530 U.S. 1202 (1999) ("Only 'responsible federal officers,' or those who act at their instance and under their control, may exercise the authority of the United States as sovereign. Foulds does not qualify").

Some courts have tried to avoid this problem by arguing that relators are "agents" of the United States. *See Truong*, 728 F. Supp. at 623; *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1094 (C.D. Cal. 1989). Calling the relator an "agent," however, does not address this Court's rule that only officers can litigate on the Government's behalf. *Buckley*, 424 U.S. at 140. If Congress were allowed, at will, to deputize "agents" to perform that function and other such functions, then Congress easily could circumvent the Appointments Clause and destroy the protections it provides.

CONCLUSION

For the reasons stated above, GPM Gas Corporation and Phillips Pipeline Company's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM J. BOYCE
Counsel of Record
RICHARD N. CARRELL
DANIEL M. MCCLURE
WARREN S. HUANG
FULBRIGHT & JAWORSKI L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(713) 651-5151
Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED NOVEMBER 9, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-21053
Summary Calendar

UNITED STATES OF AMERICA, EX REL., JACK J. GRYNBERG,

Plaintiff-Appellant,

versus

GPM GAS CORPORATION; PHILLIPS PIPELINE CO.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-97-CV-2484

Before JONES, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Jack J. Grynberg, relator, appeals from the district court's dismissal of his *qui tam* lawsuit under the False Claims

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Act ("FCA"), 31 U.S.C. § 3729, *et seq*. Grynberg sued the defendant companies on behalf of the Government, seeking to recover a portion of natural gas royalties owed the Government, based on the defendants' having allegedly mismeasured and falsely reported the volume and heating content of gas they produced on Indian lands. The district court dismissed the action pursuant to *United States ex rel. Riley v. St. Luke's Episcopal Hospital*, 982 F. Supp. 1261 (S.D. Tex. 1997) ("*Riley I*"), indicating that Grynberg lacked standing under Article III of the Constitution to bring a lawsuit on behalf of the Government.

Both the relator and the defendants now acknowledge that both the Supreme Court and the Fifth Circuit sitting *en banc* have since recognized that a private citizen has standing to file an FCA complaint under the FCA's *qui tam* provisions. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 752 (5th Cir. 2001) ("*Riley III*"). Moreover, the defendants admit that *Riley III* forecloses their contentions that the FCA's *qui tam* provisions violate the Take Care and Appointments Clauses of Article II of the Constitution. *See Riley III*, 252 F.3d at 758.

Accordingly, the decision of the district court is REVERSED and this case is REMANDED to the district court for further proceedings.

REVERSED AND REMANDED.

APPENDIX B — ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED JULY 23, 1999 AND ENTERED JULY 26, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-97-2484

UNITED STATES OF AMERICA,
EX REL JACK J. GRYNBERG

Plaintiff,

vs.

GPM GAS CORPORATION AND
PHILLIPS PIPELINE COMPANY

Defendants.

ORDER OF DISMISSAL

Before the Court are the defendants, GPM Gas Corporation's and Phillips Pipeline Company's motion to dismiss (#42) and the plaintiff United States of America ex rel. Jack J. Grynberg's motion to stay proceedings (#43) pending a determination from the Judicial Panel on Multidistrict Litigation determines whether this case should be transferred and consolidated with other similar or related cases.

Appendix B

The Court expressed its full opinion concerning *qui tam* cases in *United States ex rel Riley v. St. Luke's Episcopal Hospital*, 982 F.Supp. 1261 (S.D. Tx. 1997). Concluding that the United States has filed its "Notice of Election to Decline Intervention" in this case, the ruling in *St. Lukes Episcopal Hospital* obtains.

Relying on the Court's previous ruling, the Court Dismisses this case.

It is so ORDERED.

Signed this 23rd day of July, 1999.

s/ Kenneth M. Hoyt
KENNETH M . HOYT
United States District Judge

APPENDIX C — STATUTE INVOLVED

§ 3730. Civil actions for false claims

* * *

(b) Actions by private persons. — (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.[1] The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

* * *

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall —

---

1. See, now, Rule 4(i) of the Federal Rules of Civil Procedure.

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

* * *

(c) Rights of the parties to qui tam actions. — **(1)** If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

Appendix C

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as —

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

* * *

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person

initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

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(d) Award to qui tam plaintiff.

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(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

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